IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1309

T. CARLTON RICHARDSON,

Petitioner,

v.

HOWARD UNIVERSITY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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THE PETITIONER, T. Carlton Richardson, respectfully prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 23rd, 1976.

OPINION BELOW

The judgment of the Court of Appeals was without opinion under its Local Rule 13(c) and appears in the Appendix at page 10. The oral and written opinions rendered by the District Court appear in the Appendix at page 1 and 7 respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23rd, 1976. A timely petition for rehearing or rehearing *en banc* were denied on February 10th, 1976, and this Petition for Certiorari was filed within ninety (90) days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the grant of summary judgment denied the Petitioner his substantive right to a grievance procedure expressed in his contract of employment with the corporate Respondent thus abridging his Constitutional rights under the 7th and 5th Amendments and abusing the lower courts judicial power vicariously derived from 28 U.S.C. § 2072.

2. Whether summary judgment was appropriate in a suit involving a contract of employment consisting of an oral agreement and various written instruments solely upon the affidavits of interested parties.

STATUTORY PROVISION INVOLVED

U.S. Code, Title 28, Section 2072:

"The Supreme Court shall have the power to prescribe, by general rules . . . . the practice and procedure of the district courts of the United States in civil actions.

"Such rules shall not abridge, enlarge, or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." * * *

STATEMENT OF THE CASE

THIS CASE presents a classic example of a premature grant of summary judgment by a District Court. The facts themselves are uncomplicated:

The Petitioner was the subject of three (3) term appointments as an assistant professor between January, 1973 and June, 1975, at Howard University's School of Law. The first term appointment was for six months from January, 1973 to June, 1973, as a regular (probationary) "assistant professor" being duly notified in writing of the appointment by the proper University officials. The second term appointment was for a one year term from June, 1973 to June, 1974, as a "(special) assistant professor." The Petitioner was never notified in any manner of any change in his status as required by the tenure regulations of the University known as the Faculty Handbook revised 1967 and 1969. There is an important distinction between the two types of appointments, in that, a regular (probationary) appointee has an expectancy for re-appointment at the end of the term, while a special appointee has no presumption for reappointment regardless of the number of term appointments received.

Dean Charles T. Duncan came to the Law School during Petitioner's second term in April, 1974. Petitioner and Dean Duncan met to discuss his reappointment at which time Dean Duncan offered a one year appointment as an "assistant professor", the Petitioner having been duly recommended for such an appointment by the Law School's Appointments and Promotions Committee but for a two year term. The Petitioner accepted the appointment as an "assistant

professor" for the one year term. No discussion was even had as to the type of appointment, each assuming that the other knew. Dean Duncan reappointed Petitioner as a "(special) assistant professor". Again, Petitioner was never notified in writing of his reappointment as required by the tenure regulations and as specifically requested by the Petitioner of Dean Duncan during the discussion, and therefore had no reason to consider himself other than a regular (probationary) assistant professor with an expectancy for reappointment until permanent appointment, i.e. "tenure", was granted, if earned.

During Petitioner's third term, in December, 1974, he was duly notified by Dean Duncan that he would not be reappointed at the end of his present contract term. Whereupon, the Petitioner duly submitted a written request to Dean Duncan for the purpose of invoking the Law School's grievance procedure. Soon thereafter, a meeting was held with the Petitioner, Dean Duncan, and his associate dean in attendance wherein the Dean and his associate orally gave reasons for Petitioner's nonretention and the Petitioner again reinterated his written request for the Dean to convene the Law School Grievance Committee. Although there was some ceremonial compliance with Petitioner's request for a grievance procedure consisting of negotiations, discussions, and conversations of sorts with Law School and central administration officials, among them the University's president, no grievance procedure was accorded the Petitioner.

The tenure regulations of the University accord every academic appointee, regardless of type, the right to a grievance procedure if the appointee believes that there has been a violation of his rights secured by the tenure

regulations. The grievance procedure is automatically triggered whenever an academic appointee makes a written request alleging violations of his rights under the tenure regulations. It is the sole responsibility of the grievance committee of the appointee's school or college to determine what constitutes a grievance under the tenure regulations and, if a grievance is alleged, then to determine the grievance on its merits. The provisions of the University tenure regulations clearly state that:

> "(t)he [Grievance] Committee shall consider a case only at the request of the aggrieved person who shall transmit in writing his request to the Committee through the Dean of the school . . . concerned . . ." Faculty Handbook (rev., 1967) at 12.

and defines a "grievance" as,

> ". . . a formal complaint lodged by an academic appointee in protest of a proposed recommendation for dismissal or *in the belief* that the rights guaranteed him by the rules and regulations of the University have been violated." Faculty Handbook (rev., 1967) at 15. (Emphasis supplied).

A special appointee has no grievance if he is not reappointed at the end of his term. Neither does a regular (probationary) appointee, unless the regular appointee's nonretention is based upon considerations that violate "academic freedom." The University tenure regulations stating that:

> "(i)f a faculty member on probationary appointment alleges that a decision not to reappoint him is caused by considerations violative of academic freedom, his allegation shall be given preliminary consideration by the Grievance Committee." Faculty Handbook (rev., 1969) at 10.

Thus, all appointees, regardless of type, have a contract right to a grievance procedure during their terms of appointments if a right under the regulations has been violated. This is consistent with the fact that under the University tenure regulations there is no distinction between a tenured and nontenured faculty member. See, *Shelton v. Howard University*, Civil Action No. 2416-71 (D.C.D.C., 1972) at page 5.

When Dean Duncan failed to convene the grievance committee, the Petitioner filed suit claiming a breach of contract for failure to accord the grievance procedure in accordance with the tenure regulations of the University which governed, in part, the employment relationship between the University and Petitioner. In response to Petitioner's complaint alleging a breach of contract and various related torts, the University filed a motion for summary judgment submitting supporting memorandum and the affidavit of Dean Duncan which contained certain exerpts from the University tenure regulations as revised in 1969 and certain University internal records, *vis* three (3) "personnel action sheets" of the Petitioner which Dean Duncan claimed (although the Dean was a party to only one action) supported the University's position that the Petitioner was a "special" and not "regular" appointee as the Petitioner had alleged. The Petitioner filed his memorandum and affidavit with exhibits in opposition and cross-motioned for summary judgment, the only material fact at issue from the Petitioner's point of view being whether he was accorded his grievance procedure duly requested in term under his contract of employment with the University, which, admittedly he was not.

The District Court found, (1) that the Petitioner was a "special" appointee under a one year term appoint-

ment resulting from an "oral agreement" between Petitioner and Dean Duncan, (2) that Petitioner's terms and conditions of employment were governed, in part, by the tenure regulations as revised in 1969, and (3) that the Petitioner was not entitled to a grievance procedure under the U.S. Constitution, and therefore no breach of contract occurred when he was notified by Dean Duncan that his appointment would not be renewed. The Court of Appeals affirmed without opinion. However, the breach occurred when Dean Duncan failed to convene the grievance committee as mandated by the University's tenure regulations during the term of Petitioner's contract, not when he was notified of nonretention. Neither the District Court nor the Court of Appeals disposed of the gravamen of Petitioner's complaint which was that the University tenure regulations, comprising the written parts of Petitioner's contract of employment, having provided expressly for a grievance procedure which was denied, constituted a breach of Petitioner's contract during his term and concomitantly, extinguished any expectancy for reappointment that he may have been entitled to. Petitioner's term ended seriatim on June 30th, 1975. Such is the state of affairs that brings this Petition for a Writ to this Honorable Court.

REASONS FOR GRANTING THE WRIT

PETITIONER'S substantive and procedural rights to trial on the merits were abridged by this grant of summary judgment and the Writ of Certiorari should issue because: (1) the 7th and 5th Amendments to the Constitution command it; (2) the Congressional enact-

ment under which this Court is conferred the authority to regulate the practice and procedure of the federal district courts commands it; and (3) the decisions of this Court prohibiting the use of summary judgment procedure in situations requiring adjudication by affidavits commands it.

I.

SUMMARY JUDGMENT AS APPLIED VIOLATES SEVENTH AND FIFTH AMENDMENTS.

7th Amendment Reason

The language of the 7th Amendment is familiar to the Court, it is, in pertinent part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; * * *"

The drafters of the Constitution inserted this provision because of their concern "as to the danger of permitting a question of fact to be determined by the judge presiding at a trial." See, Hackett, "Has a Trial Judge Of the United States Court the Right to Direct A Verdict," *24 Yale L. Rev. 127, 148 (1914)*. Thus, one issue in this case: Did the District Court determine questions of fact on this motion for summary judgment which violates Petitioner's right to such determinations at trial?

Summary judgment is permissible under the 7th Amendment because it permits judgment where there are "no genuine issue as to any material fact and the

moving party is entitled to a judgment as a matter of law." Rule 56, *Federal Rules of Civil Procedure*. The purpose of summary judgment is not to cut litigants off from their right to trial by jury, if they have issues to try. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, *627*, 64 S.Ct. 724, *728* (1944); *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464, 82 S.Ct. 486 (1962). In other words, there must always be a trial when *bona fide* disputes exist as to the facts. *Associate Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945). Summary judgment is appropriate only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and where no general issue remains for trial. *Sartor* and *Poller*, *supra*. This means simply that summary judgment should be granted only when basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. *Sindermann v. Perry*, 430 F.2d 939 (5th Cir., 1970). It is the jury's function in a trial not only to find as between contradicted facts, which are true, but also to find as between contradictory inferences, which are true. Even the drawing of reasonable inferences is exclusively the province of the fact finders. "It is only inferences which *must* be drawn from evidentary facts that are the stuff of what is referred to as 'matter of law'." *Di Sabato v. Soffes*, 193 N.Y.S.2d 184, *196* (N.Y.App.Div., 1959). It has been held by this Court that where the movants evidence requires a court to draw conclusions, inferences or make presumptions as to the meaning and significance of the instruments presented, the motion for summary judgment will be denied. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575 (1968). The

written instruments which constituted Petitioner's contract of employment, i.e. the tenure regulations of the University revised 1967 and 1969, provided for a grievance procedure. The District Court concluded that the Petitioner had no Constitutional right to a grievance procedure. See, Appendix at 6 and 8. The Petitioner concedes that he may not have a Constitutional right to a grievance procedure, however, the Petitioner does have a contractual right to such a procedure which was never accorded him by the University and the District Court, *sub silencio*, affirmed the action of the University which breached Petitioner's contract. See, *Ring v. Schleshinger*, 502 F.2d 497 (D.C.Cir., 1974) (*Source of due process rights laid in employee's contract not Constitution.*) See also, *Greene v. Howard University*, 412 F.2d 1128, *1135* (D.C. Cir., 1969) (*Denial of hearing constitutes breach of employment contract.*) The grant of summary judgment thus denied the Petitioner of a valuable "substantive right" under his contract of employment with the University, and the District Court in so granting did just what the drafters of the 7th Amendment denied to the judiciary, that was, to decide a question of fact, not a "matter of law", and thereby abridged Petitioner's Constitutional right to a trial on the merits of his case.

5th Amendment Reason

As previously stated, the Petitioner was entitled to a hearing on his grievances by virtue of his employment contract as an academic appointee to the law faculty and had an "expectancy for reemployment" by virtue of his status as a regular (probationary) appointee. See,

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972) (*Expectancy for re-employment a property interest.*) The Petitioner had a legitimate claim to a grievance procedure as an integral part of his contract of employment with the University. See, Faculty Handbook (rev., 1967) at 15; (rev., 1969) at 10. The University tenure regulations provide that upon written notice to the decanal officer of the appointee's school or college, the appointee is to be accorded a hearing where "in the belief" of the appointee, a violation of his rights under the regulations have occurred. Faculty Handbook, *supra*. It is the duty of the grievance committee of the appointee's school or college to determine, first, if a grievance exists under the regulations, and second, if one does exist, whether it has merit. The grievance procedure is the University's institutional safeguard for the protection of its faculty members from potential arbitrary or capricious abuse and mistreatment by its agents or employees, whether the faculty member be regular, special or permanent. The failure of Dean Duncan to convene the Law School's Grievance Committee as required to do under the tenure regulations when requested, prevented the Petitioner from submitting his grievance to the Committee which may or may not have determined that the Petitioner had a grievance cognizable under the tenure regulations. Dean Duncan, as agent of the University, consciously, intentionally or inadvertently prevented the Petitioner from enforcing and protecting his substantive contract right and thus, vicariously, his "expectancy for re-employment." This "expectancy for re-employment" is a valuable property interest which cannot be taken without due process of law either outright or otherwise. See, *Roth, supra. 5th Amendment*, U.S. Constitution. ("*No person shall*

be . . . deprived of . . . property, without due process of law.") Consequently, when the District Court concluded that the Petitioner had no right to retention and no right under the Constitution to a grievance procedure, it participated with the University in the denial of Petitioner's right to a grievance procedure sounding in his contract of employment and Petitioner's "expectancy for re-employment." See, *Barrows v. Jackson*, 346 U.S. 435, 74 S.Ct. 19 (1935). (*No governmental instrumentality can lend its power to the denial of a Constitutionally protected right.*) The gravamen of Plaintiff's complaint below was simply that in denying his contract right to a grievance procedure, the University breached his contract of employment during the contract's term. *Greene v. Howard University, supra.* (*Denial of hearing constitutes breach of contract.*)

The Petitioner had a legitimate claim to a grievance procedure as an integral part of his contract of employment with the University. It was not that the outcome of the hearing before the Grievance Committee of the Law School would have been favorable to the Petitioner that is meaningful, but that the denial impaired his opportunity to show a possible violation of the terms and conditions of his employment contract with the University. The D.C. Court of Appeals opinioned in the *Greene* case that while the University had wide latitude in effectuating its employment policies and cannot be permitted to retain an appointee by default, this was not to mean, however, that the University was free to violate its obligations under its contract of employment without liability for breach. *Greene v. Howard University, supra,* 1135 at ¶3. There is an implied condition in every contract that neither

party will do or fail to do any act that prevents the other from fully performing and enforcing his rights, duties and obligations under the contract between them. Merely by according the Petitioner his right to a grievance procedure, the University would have fulfilled its contract obligation, for it is the "due process" that is important, not the result after the adjudication. Therefore, the grant of summary judgment denied the Petitioner his "substantive right" to a grievance procedure under his contract of employment with the University and derivatively his property right in the nature of an "expectancy for re-employment" in violation of the 5th Amendment.

II.

SUMMARY JUDGMENT AS APPLIED VIOLATES SUPREME COURT'S RULE-MAKING AUTHORITY CONFERRED BY CONGRESS.

The Supreme Court was given the rule-making power over the federal courts by Congress. 28 U.S.C. § 2072. Congress expressly declared that the rules were to regulate only "practice and procedure" and are not to "abridge . . . any substantive right" and were to preserve the "right to trial by jury." While conceding the authority of the Supreme Court to promulgate the summary judgment procedure, the actions of the judges under the procedure cannot "abridge . . . any substantive right," when applied. The question then is, did the District Court abridge any "substantive right(s)" of the Petitioner by disposing of the case on motion for summary judgment?

As discussed previously, the Petitioner's contract of employment with the University provided a grievance procedure that could be triggered in the discretion of the Petitioner so long as he believed that certain conditions violative of his contract rights were present. This grievance procedure was a valuable "substantive right" under Petitioner's contract of employment, the denial of which violated a constructive condition of his contract and thus automatically breaching his contract during its term. By summarily withdrawing the judicial forum from the Petitioner, the District Court denied, not only Petitioner's "substantive right" to a grievance procedure under contract, but also his "substantive right" to a trial by jury under the 7th Amendment of the Constitution and his "substantive right" to due process of law where the deprivation of a property interest, here Petitioner's "expectancy of re-employment", is threatened.

Furthermore, the District Court withdrew Dean Duncan from cross-examination as to the purported "oral agreement" that formed the basis of Petitioner's status under his contract of employment. The Petitioner, appearing *pro se*, was available to the District Court for questioning and cross-examination, which was done. Dean Duncan, however, was not available to the District Court or the Petitioner for questioning or cross-examination.

Two irrelevant, but *material* facts, i.e. Petitioner's status ("regular" or "special") and terms and conditions of employment (related tenure revisions and integration thereof) were adjudicated and decided by the District Court's use of the affidavits of interested parties, *viz* Petitioner and Dean Duncan, in Respondent's favor. This Court in the *Sartor* case held that while there was

"some, although not conclusive, evidence . . . that support the plaintiff's case" and that "it may well be that the weight of evidence would be found at trial to be with the defendant," the lower court

> "may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility to be determined, after trial, in the regular manner . . ." 321 U.S. at *628-629*, 64 S.Ct. at *729*.

Although the District and Appeals Courts never disposed the gravamen of Petitioner's complaint, that is, the denial of his contract right to "due process" breached his contract in term, they did, however, decide irrelevant, but *material* questions by impermissible means, i.e. use of affidavits, under Rule 56 of the *Federal Rules of Civil Procedure* which permits summary judgment where there exist no "genuine issue as to any *material* fact." Faced with two versions going to two material facts, i.e. the nature of the contract offer (status) and the terms and conditions of the contract (related tenure regulations), the District Court chose to believe the Respondent's *in camera* representations of counsel and questionable documentary evidence. It is evident that Petitioner's "substantive right" to a trial (or, at least, a "fair" hearing) was abridged by the District Court under the guise of granting a procedural motion. Such judicial abuse should not be permitted to stand unsupervised and unchecked by this Honorable Court, Congress having granted this Court the right to regulate procedure not to abridge the substantive rights of the litigants.

III.

SUMMARY JUDGMENT AS APPLIED VIOLATES THIS COURT'S ADMONITIONS AGAINST "TRIAL BY AFFIDAVIT."

Using the 1944 *Sartor* decision as a benchmark, this Court has consistently denied the right to the federal judiciary to decide questions of fact by use of affidavits on motion for summary judgment. This Court reaffirmed its commitment to the Constitutional right of a citizen to a fair and impartial determination of his controversy on the merits in the more recent 1962 *Poller* decision where the Court stated:

> "Trial by affidavit is not a substitute for trial by jury which so long has been the hallmark of 'even handed justice'." 368 U.S. at *473*, 82 S.Ct. at *491*.

These two cases have been followed consistently until now. This Court should not allow those subject to its plenary authority to regulate the procedure and practice before the federal courts to flagrantly violate its clear and definite decisions construing and interpreting the proper application of the summary judgment procedure. The impact of summary judgment is drastic, to say the least, but to permit Constitutional rights to be abridged by a federal judge under the pretext of a procedural act is even more damnifying. The awful and omnipotent power that the federal judiciary would exercise in determining the substantive rights of the litigants before them is an even more compelling reason for this Court's review.

CONCLUSION

Therefore, for the foregoing reasons, the Writ of Certiorari should issue to review the judgment of the Court of Appeals for the District of Columbia Circuit affirming the grant of summary judgment by the District Court of said Circuit.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

T. CARLTON RICHARDSON, Plaintiff,	)	
v.	)	No. 75-0285
HOWARD UNIVERSITY, et al., Defendants.	)	

ORAL OPINION GRANTING SUMMARY JUDGMENT
THURSDAY, JUNE 12, 1975

"The above action came on for cross motions for summary judgment and defendants' motion to dismiss before The Honorable BARRINGTON D. PARKER, United States District Judge, in Courtroom 19, commencing at approximately 10 o'clock, a.m.

* * *

AFTER RECESS

* * *

"THE COURT: In this proceeding, plaintiff, Mr. Richardson, seeks damages against Howard University and several of its officers including the President and the Dean of the Law School in their respective capacity, and members of the Appointments and Promotions Committee of the Law School.

He alleges that his contract of employment as a member of the Instructional Staff of the Law School was breached in that a letter addressed to him by the Law School Dean in the latter part of last year stated that his contract would not be renewed for the academic year ending in June of this year, to extend through the academic year 1975-'76.

An in that connection, the plaintiff claims both compensatory and punitive damages.

There is no claim here of any type of injunctive relief.

The plaintiff claims, among other things, that he was denied a hearing in accordance with the University grievance procedure, to which he as a faculty member was entitled; that the circumstances of his employment afford him certain procedural guarantees; that he was not informed of the grounds or the reasons for the termination of his services as a faculty member; that the defendants have acted maliciously and recklessly and otherwise have conspired among themselves to effect the termination of his employment as a member of the Law School faculty.

In this connection, defendants have filed a motion to dismiss or in the alternative a motion for summary judgment, and likewise a cross-motion for summary judgment has been filed by the plaintiff.

Now the Court in this regard has reviewed the memorandum of points and authorities filed by counsel, the affidavits of both the plaintiff and the defendants, that is, the defendants Duncan and I think President Cheek may also have an affidavit – I am sure he does have an affidavit in the file – and also the Faculty Handbook and the various documents attached to the submissions of the parties, and only recently the Court has heard and considered the argument of counsel.

While the documents, the exhibits and the records in this proceeding are not models of clarity and in some instances, leave much to be desired, certainly on the part of the University, there appears to be no significant dispute as to what the Court considers the basic facts in this case which place it in the Court's judgment in a posture where summary judgment is a proper means to dispose of the issues.

Plaintiff's first appointment to the faculty of the Howard University Law School was for a period of six months beginning in January of '73 and extending through June of '73.

His appointment was that of assistant professor.

His second appointment was for a 12-month period beginning July of '73 through June of '74.

This appointment was likewise that of an assistant professor, and the personnel action differed from the initial personnel action in that his appointment to an assistant professorship was described by the designation, "Special."

And the second contract was renewed on April 18, '74 for a period of one year to become effective at the expiration of the contract for the academic year '73-'74.

In other words, the third contract was for the academic period '74-'75, and that is the one in which he is presently operating, and it expires June 30 of this year.

Now, the University was incorporated and chartered by virtue of Congressional action, and the trustees are empowered to appoint personnel to carry out the functions and the mission of the University.

Plaintiff's employment at the University was subject and is governed by the employment policies of the University as set forth in the University Faculty Handbook revised as of February 1, 1969.

And on page 17 of the Faculty Handbook, Section XV, "Relation of Employment Policies to Contract.": and I read it

"The provisions contained in the statement of employment policies at the time of employment are

deemed to be part of the faculty member's contract with the University."

And there is a section in the Handbook in the same section, "Employment Policies."

And for some guidance in this matter as it applies to the plaintiff's situation, the Court looks at the Faculty Handbook.

Now while his first appointment as assistant professor carried no qualification or designation with that rank, his subsequent one-year appointments each carried the designation "Special Assistant Professor."

And Section 1(b) of the Handbook dealing with employment policies, page 7, provides that academic positions other than regular shall be considered special and that it includes temporary term appointments.

The section further provides that re-appointments to any special position or any term position shall not create a presumption of a right to re-apppointment, and the Handbook continues on page 8 and provides that appointments to the special classes are normally made for a period of one year and while such appointments are subject to renewal, there is no presumption of renewal.

The plaintiff did not have tenure by virtue of any of his appointments as an assistant professor.

As indicated his first appointment was for six months, and his two subsequent appointments for periods of one year each.

The section of the Handbook dealing with termination of service, and that would be on page 10 of the Handbook, provides that all appointments for a definite period of service expire automatically with the completion of the term.

Plaintiff was advised by Dean Duncan in December of 1974 that he would not be rehired.

The plaintiff contends that he was entitled to a hearing, and in that connection he refers to the Shelton case, or at least the Court's attention has been called to the Shelton case, in which a hearing was given to an assistant professor.

The facts in this case the Court distinguishes from those which are found in the Shelton case.

Charges were brought against the medical school professor in the Shelton case.

There were no charges brought against the plaintiff in this case.

The plaintiff requests the Court to infer from certain documents that certain charges were lurking in the background.

I can't agree with the plaintiff in that respect.

I say I look for guidance in the Faculty Handbook, but the facts in this case essentially as I view it are concerned with whether or not there was a breach of contract, and I have before me the affidavit of the plaintiff on page 8, paragraphs 24 and 25, which refer to the conversation that he had with Dean Duncan relative to his last appointment.

> I read it in part: "The defendant Duncan then stated that he was going to recommend a one-year appointment with the increase in salary . . .
> "He responded that he was only going to appointment me for one year because in trying to rebuild the faculty, he would need time to study the performance of its non-tenured members."
> I won't read all of it. It speaks for itself.
> And then at paragraph 25, "The defendant Duncan again reiterated that he was going to appoint me to a one-year at a $1500 increase in salary; I acquiesced."

Now Dean Duncan has likewise submitted an affidavit, and there is no clash in that whatsoever between what the plaintiff submits in his affidavit and what Dean Duncan submits in his affidavit.

So from a point of pure contract law, we have a one-year contract.

We have an offer extended by Dean Duncan which was accepted, acquiesced to by the plaintiff.

And at a later point Dean Duncan addressed the letter to the plaintiff indicating that his contract would not be renewed for the upcoming academic year 1975-1976.

To the extent that plaintiff's complaint is also based on an alleged violation of his due process right to a hearing, this Court finds that the cases of Spark v. Catholic University of America, 510 F.2d 1277 (D.C.Cir., 1975), and Greenya v. George Washington University, 512 F.2d 566 (D.C.Cir., 1975), are dispositive. Howard University is a private university. Neither (sic) government chartering nor the substantial financial support which the government supplies are themselves sufficient to invest the University with characteristics of State action, especially in view of the fact that there are no allegations that the government exercises any control over the employment practices of the University.

It is the judgment of the Court that the plaintiff's motion for summary judgment should be denied and that the defendant's motion for summary judgment should be granted.

Mr. Lane, submit an appropriate order by Monday of this week. Very well.

* * *

(Whereupon, the matter was concluded at 11:52 o'clock, a.m.)

MEMORANDUM AND ORDER

In this action Plaintiff, Mr. Richardson, seeks compensatory and punitive damages against Howard Unviersity, its President, the Dean of its Law School and the members of that Law School's Committee on Appointments and Promotions.

Defendants have moved to dismiss or in the alternative for summary judgment and a cross motion for summary jdugment has been filed by the plaintiff.

Plaintiff's basic claim is one for an alleged breach of contract.

He alleges that his contract of employment as a member of the Instructional Staff of the Law School was breached in that a letter addressed to him by the Law School Dean in the latter part of last year stated that his contract would not be renewed for the academic year ending in June of this year to extend through the academic year 1975-76. Additionally, the plaintiff claims (1) that Defendants have not accorded him a hearing in accordance with University grievance procedures to which he claims he is entitled, (2) that the circumstances of his employment afford him certain procedural guarantees, and that he was not informed of the grounds or the reasons for the non-renewal of his services as a faculty member, (3) that the defendants have acted maliciously and recklessly and otherwise have conspired among themselves to effect the termination of his employment as a member of the Law School Faculty.

There is no claim of racial discrimination in this case.

The Court has reviewed the complaint and affidavits and exhibits and memoranda of points and authorities submitted by both sides and has heard argument of

counsel. There appears to be no significant dispute as to what the Court considers basic facts in this case. According, the Court finds that as to material facts, there is no genuine issue.

Howard University was incorporated and chartered by virtue of Congressional action, and the trustees are empowered to appoint personnel to carry out the functions and the mission of the University.

Plaintiff's present employment at the University was subject to and is governed by the employment policies of the University as set forth in the University Faculty Handbook, revised as of February 1, 1969, and by subsequent oral agreement arising out of conversations between Dean Duncan and Plaintiff. Plaintiff is a nontenured faculty member whose contract with the University expires June 30, 1975. He has received due notice that his contract will not be renewed.

To the extent that plaintiff's complaint is also based on an alleged violation of his due process rights to a hearing, this Court finds that the case of *Spark v. Catholic University of American* (sic), 510 F.2d 1277 (D.C. Cir., 1975) and *Greenya v. George Washington University*, 512 F.2d 556 (D.C. Cir., 1975), are dispositive. Howard University is a private university. Neither government chartering nor the substantial financial support which the government supplies are themselves sufficient to invest the University with characteristics of "state action", especially in view of the fact that there are no allegations that the Government exercises any control over the employment practices of the University.

It is the judgment of the Court that the plaintiff's motion for summary judgment should be denied and that the defendant's (sic) motion for summary judgment should be granted.

It is therefore, adjudged and ORDERED that Defendants' motion for summary judgment be and is hereby granted, and the case dismissed.

So ordered. June 16, 1975.

Barrington D. Parker /s/
Barrington D. Parker
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

T. CARLTON RICHARDSON, Appellant,	)	
v.	)	No. 75-1599
HOWARD UNIVERSITY, et al. Appellees.	)	

JUDGMENT

APPEAL FROM the United States District Court for the District of Columbia. Before: McGOWAN, LEVENTAHAL and WILKEY, Circuit Judges.

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See, Local Rule 13(c).

ON CONSIDERATION OF THE FOREGOING, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

PER CURIAM
For the Court
Robert A. Bonner /s/
ROBERT A. BONNER
Clerk

FILED: January 23, 1976.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that three (3) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the offices of Respondent's attorney, the Honorable Dorsey Edward Lane, at 2935 Upton Street, N.W., Washington, D.C. 20008 on this ___ day of March, 1976 and that all parties required to be served have been served.

T. Carlton Richardson, J.D., LL.M.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1309

T. CARLTON RICHARDSON,

Petitioner,

v.

HOWARD UNIVERSITY, a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

The facts of this case are fully and fairly stated in the Oral Opinion of the District Court (Petitioner's Appx, at 1a) and also its Memorandum and Order (Petitioner's Appx, at 7a).

The jurisdiction of the District Court was invoked on the basis of diversity of citizenship, 28 U.S.C. § 1332.

ARGUMENT

The petition in this case presents two questions, neither of which is – or can be converted by petitioner into – one warranting review on certiorari.

1. The first question is one of pure teacher contract law: whether petitioner, a nontenured teacher employed by a private university, had a right to a grievance hearing after he was timely notified that he would not be reappointed upon the expiration of his one-year term contract. Petitioner's efforts to inflate this into a constitutional, or some other important, issue on their face beg the alleged federal question.

Petitioner, however, states that the first question (Petition, at 2) is:

> "Whether the grant of summary judgment *denied* the Petitioner his substantial right to a grievance procedure expressed in his contract of employment with the corporate Respondent thus abridging his Constitutional rights under the 7th and 5th Amendments and abusing the lower court's judicial power vicariously derived from 28 U.S.C. § 2072 [the Rules Enabling Act]."

We have italicized the word *denied* because the question, plainly enough, is not whether the summary judgment for respondents denied petitioner his right to a grievance procedure, it is whether petitioner had such a right in the first instance. As the District Court concluded from the uncontroverted facts found in the materials before it (Petitioner's Appx, at 3a-5a, 7a-8a), the statement of respondent University's employment policies at the time of petitioner's employment, the provisions of which "are deemed a part of every faculty member's contract" (Petitioner's Appx, at 4a), clearly gave him no right to a grievance hearing.

2. No amount of rhetoric and artfulness can breathe substance into the asserted abridgment of petitioner's Seventh Amendment right to a jury trial and Fifth Amendment right to a due process hearing. There is no jury trial issue in this case for two reasons: one, petitioner neither indorsed upon his complaint a demand for jury trial nor served a jury demand at any time thereafter and failure to do so constitutes a waiver of trial by jury, Rule 38(d), F.R. Civ. P.;[1] the other is that the constitutionality of summary judgment procedures was sustained long before adoption of Federal Rules of Civil Procedure. *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 320 (1902); *Irving Trust Co. v. American Silk Mills, Inc.*, 72 F.2d 288 (2nd Cir. 1934), cent. denied 293 U.S. 624; *Maryland Casualty Co. v. Sparks*, 76 F.2d 288 (6th Cir. 1935); *General Investment Co. v. Interborough Rapid Transit Co.*, 2[illegible] N.Y. 133, 142, 143, 139 N.E. 216, 220 (1923); *Walter v. Walker*, 35 N. J. L. 262 (1871);

[1] Over a century ago this Court held that the right to jury trial, like other constitutional rights, can be waived. Kearney v. Case, 12 Wall, 275, 281 (1870). See also United States v. Moore, 340 U.S. 616, 621 (1951). And courts of appeals have held uniformly that the automatic waiver provision of Rule 38 does not violate the Seventh Amendment. See Wilson v. Corning Glass Co., 195 F.2d 825 (9th Cir. 1952); General Tire & Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir. 1964), cert. denied 377 U.S. 972; Krodel v. Houghtaling, 468 F.2d 887 (4th Cir. 1972); Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668 (9th Cir. 1975). See also Cannister Co. v. Leahy, 182 F.2d 510, 514 (3rd Cir. 1950); United States v. Strewl, 99 F.2d 474, 478 (2d Cir. 1938), cert. denied 306 U.S. 668.

cf. *Ex parte Peterson*, 253 U.S. 300, 309, 310 (1920).[2]

3. A similar oversight infects petitioner's Fifth Amendment claim to a due process hearing. On the one hand, he ignores the fact that the Fifth Amendment is only applicable against governmental action that is federal in character. It is not directed against private parties. *Corrigan v. Buckley*, 271 U.S. 323 (1926); *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 461 (1952); cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954). On the other hand, petitioner overlooks the lengthening line of cases holding that Howard University is a private educational institution and not a government instrumentality. See *Williams v. Howard University*, No. 74-1836, D.C. Cir., November 13, 1975; *Cobb v. Howard University*, 106 F.2d 860, 863, 70 App. D.C. 339, 342 (1939); *Maiatico Const. Co. v. United States*, 79 F.2d 418, 65 App. D.C. 62 (1935), cert. denied 296 U.S. 649; *Greene v. Howard University*, 271 F. Supp. 609, 612-613 (D.D.C. 1967), rev'd on other grounds 412 F.2d 1128, 134 U.S. App. D.C. 81 (1969); *Willis v. Cheek*, Civil No. 75-0389, D.D.C., April 30, 1975; *Sanford v. Howard University*, Civil No. 75-1034, D.D.C., February 26, 1976, app. noticed March 24, 1976.

4. Another issue asserted under the first question stated by petitioner is whether the summary judgment

[2] "Given these precedents it is not surprising that there have been few cases under Rule 56 that have questioned its constitutionality. Rather, most courts simply have stated that the rule was not intended to deprive a party of a jury trial." Wright & Miller, Federal Practice And Procedure, §2714 at p. 413 (1969), citing Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1920) and Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962).

rule, as applied in this case, violates the Rules Enabling Act. This issue is insubstantial; and the argument advanced by petitioner is flimsy, too. Cleansed of tautology, it boils down to the proposition that the District Court, inasmuch as it rendered summary judgment on the basis of the affidavits of parties, withdrew an affiant from cross-examination by petitioner, and decided two "irrelevant, but *material* facts" (Petition at 14, 15) (emphasis petitioner's), applied the summary judgment procedure of Rule 56 in violation of the Rules Enabling Act's injunctions against abridging substantive rights and the Seventh Amendment guaranty of the right to jury trial.

The facts subsumed in this proposition do not sustain it. First, supporting and counter affidavits of parties are beyond doubt materials which a District Court is entitled to consider at a hearing on motions for summary judgment provided they are "made on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e), F.R. Civ. Proc. Moreover, it is clear that summary judgment may be rendered solely on the basis of affidavits meeting the testimonial requirements of Rule 56(e), see *Orvis v. Brickman*, 196 F.2d 762, 90 U.S. App. D.C. 266 (1952); *Surkin v. Charteris*, 197 F.2d 77 (5th Cir. 1952); *Dyer v. McDougall*, 201 F.2d 265 (2d Cir. 1952), without abridging any substantive right or the right to jury trial preserved by the Seventh Amendment.[3] Next, the fact

[3] However, as the Court observed in Beacon Theatres, Inc. v. Westover, "no similar requirement protects trial by the Court." 395 U.S. 500, 510 (1959). See The Genessee Chief v. Fitzhugh, 12 How. 443, 459-460 (1851); Ex parte Wall, 107 U.S. 265, 289 (1883); Bauman v. Ross, 167 U.S. 548, 593 (1896).

that affiants are not exposed to cross-examination at the hearing on a motion for summary judgment surely does not offend the Seventh Amendment save in cases like *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), a treble damage suit under the Sherman Act, where the litigation was complex, motive and intent were important, proof was largely in the hands of the alleged conspirators, and creditability was a weighty factor.[4] Petitioner's case, of course, only can be equated with *Poller* when "measured by the yardstick of a disappointed litigant or losing lawyer." *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957).

5. The second question stated by petitioner (Petition, at 2) is:

> "Whether summary judgment is appropriate in a suit involving a contract of employment consisting of an oral agreement and various written instruments solely upon the affidavits of interested parties."[5]

This issue, as the discussion in the immediately preceding paragraph shows, is also without merit and its

[4] See White Motor Co. v. United States, 372 U.S. 253, 259 (1963): "Summary judgments have a place in the antitrust field, as elsewhere, though we warned in Poller . . . they are not appropriate 'where motive and intent play leading roles.' Some of the law in this area is so well developed that where, as here, the gist of the case turns on documentary evidence, the rule can be divined without a trial." See also First Nat. Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968); Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 315 U.S. 788 (1942).

[5] It should be noted that these "various written instruments" were attached to, and made a part of, the affidavits filed by the opposing parties and that included in them are petitioner's appointment papers and all pertinent extracts from the Faculty Manual.

want of importance is indicated by petitioner's failure to argue, explain or even fairly intimate why the Court should decide it. Finally, petitioner has exercised his right of appeal to D.C. Circuit on the questions involved here: that, we submit, satisfies his rights as an individual litigant.

6. Thus, on these facts, the decision of the District Court and the affirmance of the Court of Appeals are clearly correct. In any event, the decisions below are in full accord – not contrary to – the principles expressed in decisions of this Court. There is no conflict among the circuits asserted by petitioner. Manifestly, there is no important question of constitutional or federal statute law requiring review by this Court. The time to terminate this litigation is now.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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HOWARD UNIVERSITY, a corporation,

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PETITIONER'S REPLY MEMORANDUM

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IF PETITIONER had a *contract* right to a grievance procedure, then clearly the District Court abridged its power under the Summary Judgement Procedure, and the Writ should issue to review this case. Respondent seek's to extend the District Court's ruling beyond its express statement. The District Court held only that the Petitioner had no *Constitutional* claim to a due process

procedure. The lower court never expressed any opinion as to Petitioner's due process rights which inured in his contract of employment. To the contrary, the Transcript of the proceedings reveal that the lower court refused to entertain such a notion. Transcript, at 36. Respondent's failure to meet the substantive issue of the lower court's apparent oversight in concluding that Petitioner had neither a constitutional *nor* contract right to a grievance procedure, emphasizes the need for plenary review of the action below.

The Petitioner has not waived his right to a trial by jury under Rule 38(d) of the *Federal Rules of Civil Procedure*. The period in which such a demand upon his Complaint which he "may" have done, is from the time of filing his Complaint until ten (10) days "after service of the last *pleading*" directed to any issue triable of right by a jury under the 7th Amendment. The *Rules* no where denote a motion for summary judgment as a pleading. See, *Rule* 7. The defect in the purported waiver by Petitioner of his right to trial by jury is that the Respondent never filed an answer! Instead, the Respondent filed the motion for summary judgment which could not, under the *Rules*, be converted into an answer. Thus, Petitioner could not have waived his right to trial by jury, for his demand would have had to be made within ten (10) days of Respondent's answer, which was never filed. Again, the need for plenary review of the action below is indisputable.

If the affidavit of Dean Duncan, an interested party, contained "facts that would be admissible in evidence" as required by *Rule* 56(e), then the District Court could have "divined without a trial" the controversy before it. But Dean Duncan's affidavit contained no "facts" and neither did the affidavit of President Cheek of the

University. In order to stress the Court's need to supervise and regulate the lower court in this instance, the entire affidavit of Dean Duncan is setout:

> "I, CHARLES T. DUNCAN, Dean of the Howard University School of Law, being first duly sworn according to law on oath, depose and say:
>
> "1. That, I became consultant to President Cheek and the Board of Trustees of Howard University on the 1st of March 1974, serving '½ time.' Concomitantly, I was designated by the President as the person to become Dean of the School of Law in Howard University beginning on July 1, 1974. In March of 1974, I became informed of the fact that eight or nine law teacher contracts were due to expire on June 30, 1974. Accordingly, on the 19th or 20th of March, I personally discussed with all of the teachers whose contracts were due to expire the problems inherent in having a new dean making determinations as to the kind of recommendations with respect to contract renewals which should be made concerning these teachers. I explained to them that because I was new to the situation and not then knowledgeable with respect to these individuals, that I would adopt the policy—in order to be fair to them—of offering them one year term appointments in order to afford an opportunity to be in a better position to get to know them and their work. Among these teachers was the Plaintiff, Mr. T. Carlton Richardson who, was fully informed in the premises and who agreed at that time to accept a one year appointment expiring June 30, 1975. Such special appointments are permissible under the Faculty Handbook Page 7, Section 1, B, 1, a copy is attached hereto and made a part hereof. Also attached and made a part hereof are copies of the Personnel Action Sheets showing the Special appointment in accordance with the

understanding between Mr. Richardson and myself."

And, likewise, the affidavit of President Cheek:

"I, JAMES E. CHEEK, being first duly sworn according to law on oath, depose and say:

"1. That, I am President of Howard University;
"2. That, I have received no fromal recommendation from the Dean of the Law School with respect to the renewal or non-renewal of the plaintiff's employment contract ending June 30, 1975."

If these meet the standards under the Summary Judgment Procedure, then the Court should deny the Writ and end the litigation now!

The grant of summary judgment violated the right of Petitioner to trial on the merits of his controversy under the 7th Amendment failing to decide the question of Petitioner's right to due process under his contract of employment, denied his 5th Amendment property rights in the nature of his expectancy for reappointment, and violated the clear mandates of this Court that proscribe the use of summary judgment procedure where the substantive rights of the litigants are infringed upon and the decision is based solely upon the affidavits of interested parties. The inability of the Respondent to face the issues presented in this Petition pinpoints the need for this Court's plenary review of the action below. Indeed, the Petitioner suggests that summary reversal is now in order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS TO CERTIFY that three (3) copies of the Petitioner's Reply Memorandum were mailed, postage prepaid, to the offices of Respondent's attorney, the Honorable Dorsey Edward Lane, at 2935 Upton Street, N.W., Washington, D.C. 20008 on this 23rd day of April, 1976, and that all parties required to be served have been served.

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